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ARAB MALAYSIAN MERCHANT BANK BHD & ANOR v. TAN GIAP HOW & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[APPEALS NO: W-02(A)-1498-08-2016 & W-02(A)-1541-08-2016]
13 MARCH 2019

C ***CIVIL PROCEDURE:*** *Judicial review – Appeal against – Application for judicial review against decision of Employees' Provident Fund ('EPF') – Employee lodged complaint with EPF that employer's portion of EPF was wrongly deducted from gross incentive – EPF concluded employer's act of deducting portion from incentive payment not wrong and employer not required to contribute to EPF for incentive payment – Whether decision or outcome of investigation by public authority open* D *to judicial review – Whether court ought to entertain application – Whether judicial review application proper mode for claim for monies under EPF contribution*

When Tan Giap How ('Tan') commenced employment with Amsecurities Sdn Bhd ('Amsecurities'), it was agreed that Tan would be entitled to 50% of the net brokerage. Tan also requested Amsecurities to reduce the E employer's statutory contribution to the Employees' Provident Fund ('EPF') for the incentive payment, from 16% to 12%, since it was deducted from the net brokerage sum. Amsecurities contributed 16% as the employer's contribution to the EPF in respect of Tan's monthly salary as per his contract of employment. Tan was later informed that the business of Amsecurities F would be transferred to the Arab Malaysian Merchant Bank Bhd ('AMMBB'). The AMMBB offered employment to Tan based on the same terms and conditions with Amsecurities and also contributed 16% as the employer's portion to the EPF while his incentive payment was also maintained. Tan lodged a complaint with the EPF that the employer's G portion of the EPF was wrongly deducted from gross incentive during his tenure and requested EPF to review his case. Following investigations, the EPF concluded that (i) the AMMBB's act of deducting the employer's portion from the incentive payment was not wrong since the incentive payment was on a profit sharing; and (ii) under the law, the AMMBB, as the employer, was not required to contribute to the EPF for the incentive H payment made out to Tan. Dissatisfied with the findings of the EPF, Tan filed a judicial review application at the High Court, against the EPF, the AMMBB and Amsecurities, on the grounds that (i) the EPF's decision was contrary to the evidence on record; and (ii) the decision was outrageous in its defiance of logic or accepted moral standards. The High Court allowed

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the application. Hence, the present appeals (i) by the AMMBB and Amsecurities against the decision of the High Court Judge ('HCJ') in (a) quashing the opinion of the EPF; and (b) declaring that the AMMBB and Amsecurities action in deducting the employer's contribution towards EPF, at 12% from Tan's wages, was null and avoid and ordering them to repay Tan these monies ('the first appeal'); and (ii) by Tan against the decision of the HCJ that the AMMBB and Amsecurities were liable to pay 4% EPF contribution into Tan's account as an additional contribution ('the second appeal').

Held (allowing first appeal; dismissing second appeal)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Upon receiving the complaint from Tan, the EPF opened up an investigation and all the affected parties were investigated before the EPF finally came up with its so-called decision. A decision by a public authority, in exercise of its investigative powers, is not susceptible to judicial review. Looking at the character of the power of the EPF, although the EPF's decision or finding formed part of its public duty, that duty is exercised in relation to its criminal prosecutorial power and jurisdiction. Such exercise of prosecutorial power is beyond the remit of judicial review and outside the civil jurisdiction of the courts. It was also very clear from the records that there was no *mala fide* established against the EPF. In the result, the HCJ erred when she entertained the judicial review application by Tan and when she went on to grant his prayer in quashing the decision of the EPF, when in fact and in law, she ought not to have done so. (paras 21, 22 & 25)

(2) The essence of the complaint by Tan was that this was a case concerning s. 65 of the Employees Provident Fund Act 1991, related to the recovery of contribution by the employer. If that be the case, the proper mode would be for the EPF to be compelled to ensure that the employer pay its contribution to the EPF, not by way of requiring the employer to pay direct to Tan. Tan should have filed for *mandamus* for that purpose, if indeed any contribution sum was due to be paid to the EPF. (para 34)

(3) As regards Tan's appeal, it was concerned with whether the HCJ was correct in her decision. The EPF did not express any views or finding on whether AMMBB and Amsecurities were duty-bound to contribute 12% or 16% towards Tan's EPF. Indeed that was not part of the complaints advanced by Tan. Consequently, it would not be open to Tan to now challenge the same or to seek a consequential order for the payment of the differential sum. Furthermore, Tan's statement, pursuant to O. 53 of the Rules of Court 2012, did not raise the issue of the differential. The party applying for relief is bound by the statement and

could not rely or go beyond the matters raised. The failure/omission to raise this issue in the statement would be fatal. From a scrutiny of the documents adduced in this case by all parties, it was an undisputed fact that it was Tan who had insisted that, as a term of the contract agreement between him and his two employers, the rate of EPF contributions to be made by the latter be 12%. The ensuing disputes between the parties was one that was substantially in the nature of a private dispute. As such, the HCJ was correct when she refused to grant Tan the consequential reliefs that he was praying for. (paras 36 & 37)

Bahasa Malaysia *Headnotes*

Ketika Tan Giap How ('Tan') mula berkhidmat dengan Amsecurities Sdn Bhd ('Amsecurities'), disetujui bahawa Tan berhak menerima 50% untung bersih pembrokeran. Tan juga meminta Amsecurities mengurangkan caruman statutori majikan dalam Kumpulan Wang Simpanan Pekerja ('KWSP') untuk bayaran insentif, daripada 16% menjadi 12%, kerana ini ditolak daripada jumlah untung bersih pembrokeran. Amsecurities mencarum 16% sebagai caruman majikan dalam KWSP terhadap gaji bulanan Tan, seperti kontrak perkhidmatannya. Tan kemudian dimaklumkan bahawa perniagaan Amsecurities akan dipindah milik kepada Arab Malaysian Merchant Bank Bhd ('AMMBB'). AMMBB menawarkan pekerjaan kepada Tan berdasarkan terma-terma dan syarat-syarat sama dengan Amsecurities dan turut mencarum 16% sebagai bahagian majikan dalam KWSP manakala bayaran insentifnya juga dikekalkan. Tan membuat aduan pada KWSP bahawa bahagian majikan KWSP salah ditolak daripada insentif kasar semasa dia berkhidmat dan memohon agar KWSP menyemak semula kesnya. Berikutan siasatan, KWSP menyimpulkan (i) tindakan AMMBB menolak bahagian majikan daripada bayaran insentif tidak salah kerana bayaran insentif juga berdasarkan perkongsian untung; dan (ii) bawah undang-undang, AMMBB, sebagai majikan, tidak dikehendaki mencarum EPF untuk bayaran insentif yang dibuat pada Tan. Tidak berpuas hati dengan dapatan-dapatan KWSP, Tan memfailkan permohonan semakan kehakiman terhadap EPF, AMMBB dan Amsecurities, di Mahkamah Tinggi, atas alasan (i) keputusan KWSP bercanggah dengan keterangan yang direkodkan; dan (ii) keputusan tersebut sangat mengejutkan, mengingkari logik atau standard moral yang diterima. Mahkamah Tinggi membenarkan permohonan tersebut. Maka timbul rayuan-rayuan ini (i) oleh AMMBB dan Amsecurities terhadap keputusan Hakim Mahkamah Tinggi ('HMT') (a) membatalkan pendapat KWSP; dan (b) mengisytiharkan tindakan AMMBB dan Amsecurities menolak caruman majikan dalam KWSP, pada kadar 12% daripada gaji Tan, sebagai tidak sah dan terbatal dan memerintahkan mereka membayar Tan jumlah ini ('rayuan pertama') dan (ii) oleh Tan terhadap keputusan HMT bahawa AMMBB dan Amsecurities bertanggungan membayar caruman KWSP sebanyak 4% dalam akaun Tan sebagai caruman tambahan ('rayuan kedua').

Diputuskan (membenarkan rayuan pertama; menolak rayuan kedua)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Selepas menerima aduan Tan, KWSP memulakan siasatan dan semua pihak-pihak yang terjejas disiasat sebelum KWSP mencapai keputusannya. Keputusan pihak berkuasa awam, dalam menjalankan kuasa siasatannya, tidak terbuka buat semakan kehakiman. Melihat sifat kuasa KWSP, walaupun keputusan atau dapatan KWSP membentuk sebahagian tanggungjawab awamnya, tanggungjawab ini dijalankan berkaitan kuasa dan bidang kuasa pendakwaan jenayahnya. Penjalanan kuasa pendakwaan sedemikian melangkaui bidang kuasa semakan kehakiman dan luar bidang kuasa sivil mahkamah-mahkamah. Jelas, berdasarkan rekod, bahawa tidak terbukti niat jahat oleh KWSP. Akibatnya, HMT terkhilaf apabila beliau mendengar permohonan semakan kehakiman Tan dan apabila beliau seterusnya membenarkan permohonannya membatalkan keputusan KWSP, sedangkan, bawah fakta dan undang-undang, beliau tidak sepatutnya berbuat demikian.

(2) Inti pati aduan Tan ialah bahawa kes ini berkenaan s. 65 Akta Kumpulan Wang Simpanan Pekerja 1991, berkaitan pengembalian caruman oleh majikan. Jika itu kesnya, cara yang sesuai ialah agar KWSP memastikan majikan membayar caruman pada KWSP, bukan melalui cara mengkehendaki agar majikan membayar secara langsung pada Tan. Tan sepatutnya memfailkan *mandamus* untuk tujuan tersebut, jika sememangnya terdapat apa-apa jumlah caruman yang harus dibayar pada KWSP.

(3) Berkaitan rayuan Tan, ini berkenaan sama ada HMT betul dalam keputusan beliau. KWSP tidak menyatakan apa-apa pandangan atau dapatan sama ada AMMBB dan Amsecurities bertanggungjawab mencarum 12% atau 16% terhadap KWSP Tan. Ini sememangnya bukan sebahagian aduan yang dikemukakan oleh Tan. Berikutan itu, tidak terbuka buat Tan untuk kini mencabar isu ini dan memohon perintah sampingan bayaran jumlah kebezaan. Tambahan lagi, pernyataan Tan, bawah A. 53 Kaedah-kaedah Mahkamah 2012, tidak membangkitkan isu kebezaan. Pihak yang memohon relief terikat dengan pernyataan dan tidak boleh bersandar atau melampaui hal-hal perkara yang dibangkitkan. Kegagalan/ketinggalan membangkitkan isu dalam pernyataan adalah menjejaskan. Berdasarkan penelitian dokumen-dokumen yang dikemukakan oleh pihak-pihak dalam kes ini, fakta yang tidak dipertikai ialah bahawa Tan yang menggesa agar, sebagai terma dalam kontrak perjanjian antaranya dengan dua majikannya, kadar caruman KWSP yang perlu mereka buat ialah 12%. Pertikaian-pertikaian yang timbul antara pihak-pihak, sebahagian besarnya, bersifat pertikaian persendirian. Oleh itu, HMT bertindak betul apabila beliau enggan membenarkan relief-relief sampingan yang dipohon oleh Tan.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chong Thian Fook v. Sarawak Shell Bhd & Ors (No 2) [2004] 1 LNS 394 HC ***(refd)***

Employees Provident Fund Board v. MS Ally & Co Ltd [1975] 1 LNS 36 FC ***(refd)***

Holman v. Johnson [1775-1802] All ER Rep 98 ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 PC ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Sarawak Shell Bhd & Ors v. Chong Thian Fook & Another Appeal [2007] 2 CLJ 624 CA ***(refd)***

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017] 10 CLJ 1 FC ***(refd)***

The Queen v. Postmaster General [1876] QBD 658 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 25

Employees Provident Fund Act 1991, ss. 41(1), 47(1), 65

Malaysian Anti-Corruption Commission Act 2009, s. 30(1)(a)

Rules of the High Court 1980, O. 53

Other source(s) referred to:

Prem's Judicial Dictionary, vol 2, p 1415

For the appellant - Porres Royan, M Pathmanathan, S Rutheran & Kumar; M/s R Sivagnanam & Assocs

For the respondent - VK Raj, Goik Kenzu, Yohini Nair; M/s P Kuppusamy & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review Application No: R2-25-55-03-2016 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case/Case For Plaintiff

[1] The applicant, Tan Giap How ("Tan") commenced employment with the third respondent, Amsecurities Sdn Bhd (Amsecurities) as Head, Institutional Sales on 13 October 2005 for a duration of two years.

[2] Before the appointment, Tan had a discussion with Amsecurities on 25 July 2005 whereby there was an agreement between Tan and Amsecurities, in which Tan, who is a holder of a dealer's representative license will be entitled to 50% of net brokerage earned from business and dealings in securities from Merrill Lynch's Agency, programme and proprietary trade business and also from its clearing account gain/loss.

[3] Tan, during the discussion also requested Amsecurities to reduce the employer's statutory contribution to the Employers Provident Fund ("EPF"), the first respondent, for the incentive payment from 16% to 12% since it is deducted from the net brokerage sum.

[4] During discussion with Amsecurities, Tan referred to his previous contract of employment with Kuala Lumpur Securities Sdn Bhd and requested that the same terms and incentive scheme be applied.

[5] Amsecurities contributed 16% as the employer's contribution to EPF in respect of Tan's monthly salary as per his contract of employment.

[6] *Vide* letter dated 29 January 2007, Tan was informed that the business of Amsecurities will be transferred to the second respondent, Arab Malaysian Merchant Bank Bhd (now known as AmInvestment Bank Berhad) ("Arab Malaysian").

[7] *Vide* letter dated 30 January 2007, Tan was offered employment by Arab Malaysian based on the same terms and conditions with Amsecurities. Tan was offered the position of Director, Equity Markets from 3 March 2007 to 12 October 2007. Arab Malaysian also contributed 16% as the employer's portion to EPF in respect of Tan's monthly salary as per the contract of employment. In respect of the incentive payment, the arrangement was maintained as agreed by both parties.

[8] Tan's contract of employment was extended whereby the same incentive scheme as per Kuala Lumpur Securities Securities Sdn Bhd scheme was followed upon Tan's request. The last contract of employment with Arab Malaysian was from 1 August 2013 to 31 July 2014.

[9] Tan filed a complaint to EPF on 8 September 2014 that the employer's portion of EPF was wrongly deducted from the gross incentive during his tenure and requested EPF to review his case.

[10] EPF conducted investigations and concluded that Arab Malaysian's act of deducting the employer's portion from the incentive payment was not wrong since the incentive payment was on a profit sharing. It also made a finding that under the law, Arab Malaysian as the employer was not required to contribute to EPF for the incentive payment made out to Tan.

[11] Dissatisfied with the findings of EPF, Tan filed a judicial review application ("JR") at the Kuala Lumpur High Court.

[12] Tan contended that:

(a) EPF's decision was contrary to the evidence on record; and

(b) the decision was outrageous in its defiance of logic or accepted moral standards.

Findings Of The High Court

[13] The High Court Judge allowed Tan's application as per prayers (i), (ii)(a), (b), (c)(ii) and prayer (iii).

[14] Dissatisfied, Arab Malaysian and Amsecurities, *vide* appeal W-02(A)-1498-08-2016 ("Appeal 1498") appealed to the Court of Appeal against part of the decision, *inter alia*, the decision of the learned High Court Judge:

(i) in quashing the opinion of the EPF contained in their letter dated 7 January 2015 ("the EPF's view");

(ii) in declaring that Arab Malaysian and Amsecurities' action in deducting the employer's contribution towards EPF (at 12%) from the wages of Tan from 2006 to 2014 as null and void and ordered them to repay Tan these monies.

[15] Tan also filed a notice of appeal *vide* Appeal W-02(A)-1541-08-2016 ("Appeal 1541") in respect of the decision of the High Court that:

> Responden Kedua dan Ketiga adalah bertanggung untuk membayar ke dalam akaun KWSP Pemohon baki 4% caruman KWSP sebagai caruman tambahan ke atas semua bayaran yang tertunggak seperti yang dinyatakan di perenggan (b) di atas (mengikut terma kontrak perkhidmatan Pemohon), dengan serta merta.

The Appeals

[16] Both appeals were heard together on 28 July 2017, and adjourned to 22 January 2018 where we delivered our decision on the same date. These are now our grounds for having so decided.

[17] In Appeal 1498, Arab Malaysian and Amsecurities submitted the following issues, namely:

(a) the EPF's views are not in the nature of a public law decision which may be impugned by way of JR under O. 53;

(b) decision was not a public law decision which was susceptible to JR;

(c) implication on the limitation period;

(d) if the "opinion" is a reviewable decision, then it involves findings of fact and of degree for which the High Court Judge ought not to have intervened;

(e) Arab Malaysian and Amsecurities are not in breach of s. 47(1) of the Employees Provident Fund Act 1991 ("EPF Act"); and

(f) alternatively, the learned judge ought to have refused relief if s. 47(1) of the EPF Act was breached by reason of s. 25 of the Contracts Act 1950.

[18] Tan, in Appeal 1541 submitted that:

(a) the learned High Court Judge had erred in law and in fact when she disallowed Tan's claim for the balance 4% of the EPF contribution for the years 2006 to 2014. Despite the undisputed fact that Tan had, in principle agreed that the employer's EPF contribution be reduced from 16% to 12%, Tan contended that under the law, any agreement to change the percentage of contribution to the employee's EPF account must be effectuated by filing the relevant statutory forms. The agreement between Tan, Arab Malaysian, and Amsecurities is said to be insufficient to deny Tan the balance of 4% contribution.

Deliberations And Our Findings

[19] One of the main complaints that was raised before us was that the so-called 'decision' of the first defendant (EPF) was not of such a nature which was envisaged under O. 53 of the ROC 2012. It was contended before us by learned counsel for EPF that what had emanated from EPF as a response to the complaint sent to it by Tan was only an advisory opinion which was not binding on Tan for the simple reason that EPF had no power to make such decision. For clarity, we reproduce the submission of learned counsel for the EPF, like so:

> The EPF's views which were challenged by Tan is not in the nature of a decision and is not capable of being reviewed as it was advisory in nature. Not every action by a statutory body lends itself to judicial review. This is especially so when mere advice is sought to be reviewed. This error goes to the threshold jurisdiction of the High Court pursuant to Order 53 of the ROC 2012. Tan was really disputing a private contract and its concept of net brokerage. The terms of this contract were proposed by Tan himself based on his previous employment terms. (See paragraph 2.3 of written submission for the Employers in Appeal 1498).

[20] We had, with respect, agreed with learned counsel for the EPF. Be that as it may, it was our view as well that a decision made by the EPF as a result of it exercising its investigative/prosecutorial powers under the EPF Act is a decision which is not open to JR.

[21] In this case, upon receiving the complaint from Tan, EPF had opened up an investigation into the matter and all the affected parties were investigated before EPF finally came up with its so-called impugned decision dated 7 January 2015.

[22] Now, it has been the law that a decision by a public authority in exercise of its investigative powers is not susceptible to JR. Law reports are replete with decisions of high authority to such effect. The oft-quoted decision to that effect has been the New Zealand case of *R v. Sloan* [1990] 1 NZLR 474 ("the *Sloan* case"). Recently, our apex court had decided to like effect in the case of *SPRM & Ors v. Latheefa Beebi Koya & Anor* [2017] 10 CLJ 1 ("the *Latheefa B Koya* case").

[23] We were of the view that it was necessary to highlight the circumstances surrounding the *Latheefa B Koya* case, as could be distilled from the reported decision of the apex court. It had been this. The respondents therein filed an application for leave to apply for JR under O. 53 of the Rules of the High Court 1980 ("RHC") for *inter alia*, an order of *certiorari* to quash the notice issued under s. 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009 ("the Act"). The High Court granted the application and quashed the said notice on the ground that it was issued as an act of intimidation against the respondent acting as counsel for their client and an abuse of the appellants' powers under the Act and therefore void and unlawful. The Court of Appeal agreed with the High Court and dismissed the appellants' appeal. The appellants were granted leave to appeal to the Federal Court on the following question of law: whether a criminal investigative process such as a notice of investigation under s. 30(1)(a) of the Act was amenable to JR.

[24] Having considered the authorities pertaining to this issue, the apex court was of the view that the law as stated in the *Sloan* case *(supra)* would represent the correct approach to the pertinent legal situation. At p. 14 of the *Latheefa B Koya* case report *(supra)* the apex court had gone on to say:

> [37] The weight of authorities tend to support the view that the actions or decisions of a public authority in exercise of its legitimate powers at the investigative stage are not amenable to judicial review. In *R v. Sloan* [1990] 1 NZLR 474, Sloan was convicted under the Gaming and Lotteries Act 1977 for operating an illegal game of chance by using certain machines. After his conviction, he converted the use of those machines to a prize competition, which is outside the scope of the Act. But the Inspectors of Gaming still considered the new scheme an illegal game and issued letters to Sloan to cease operations forthwith, coupled with a threat of enforcement. Sloan then applied for a review under the Judicature Amendment Act 1972 and sought a declaration that the new scheme was lawful under the Gaming and Lotteries Act 1977 and that no enforcement actions should be taken against him. The High Court dismissed the application for review, holding that the decision of the inspectors was not subject to review.
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> [38] *R v. Sloan* was favourably considered in *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] 7 CLJ 422. In the latter case, the applicants (*City Growth Sdn Bhd & Anor*) applied for leave under O. 53 r. 3 of the RHC for an order of *certiorari* to quash the order issued by the Deputy Public Prosecutor under s. 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2011 (AMLA) directing the banks not to part with or deal in or otherwise dispose of the movable property, including any monetary instrument in the name of the applicants, based on information pursuant to investigation that the movable property is related to commission of an offence under s. 4 of AMLA. The High Court dismissed the leave

application, holding that the order of the DPP was not amenable to judicial review. If all decisions and actions of public authority of this nature are amendable to review, the government machinery may not be able to function smoothly as the investigation process of all enforcement agencies would be open to constant judicial review. The High Court in *City Growth Sdn Bhd*'s case had in turn followed its earlier decision in *Ahmad Azam Mohamad Salleh & Others v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86 where it held that the result of the inspection under the Cooperative Societies Act 1983 was not amenable to judicial review.

[39] The decision in *City Growth Sdn Bhd*'s case was cited and approved by this court in *Empayar Changgih Sdn Bhd*'s case. The appellant, Empayar Changgih Sdn Bhd, was in the business of manufacturing video compact discs, which was licensed under the Optical Discs Act 2000 (Act 606). A raid was conducted at the new office of the appellant based on information that an offence under the Act could have been committed. During the raid, certain machines and equipment were seized and removed from the premises, causing some damage to the machines and equipment. The appellant filed an application for an order of *certiorari* against the respondents to quash the decision of the second respondent who refused to release the seized machines and equipment, and for an order of *mandamus* to compel the second respondent to release and return the seized machines and equipment.

[40] Before the hearing of the judicial review application, the prayers were amended, limiting the reliefs only for a declaration that the seizure of the machines and equipment was done without reasonable cause. The High Court dismissed the application holding that, on the facts, the raid and seizure was based on a reasonable cause in exercise of an investigative function. Its decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this court against the decision of the Court of Appeal. One of the questions of law posed was:

> Whether in a judicial review application which challenges the validity of the respondent's decision ... to seize any article, optical disc, thing, book or document under section 38(7) of the Act 606, it is necessary for the Respondents to justify the need for such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted.

[41] The appeal was dismissed by this court. It was held in that case that an exercise of power in the course of a criminal investigation is not open to judicial review under O. 53 RHC. To hold otherwise would be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament. It was also held that the seizure was made in the course of a criminal investigation of an offence pursuant to the powers conferred by the Act. Such seizure was not amenable to judicial review. The appellant could have filed a writ action for damages.

A [42] The general conclusion that can be drawn from the cases referred to above is that the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore, the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the
B third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued *mala fide* or in bad faith.

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[25] Applying the principle as enunciated in *Latheefa B Koya* case *(supra)* to the case before us, it was undisputed that the impugned decision of the EPF was made in response to Tan's complaint which had resulted in the EPF exercising its investigative powers under the EPF Act. Once that was
D established by Tan, as it was in this case, the embargo against JR of that decision kicked in. Looking at the character of the power of EPF under s. 41(1), although EPF's decision or finding forms part of its public duty, that duty is exercised in relation to its criminal prosecutorial power and jurisdiction. Such exercise of prosecutorial power is beyond the remit of the JR and outside the civil jurisdiction of the courts. It was also very clear from
E the records that there was no *mala fide* established against the EPF, which could strike the embargo down, by Tan. In the result, the learned High Court Judge was wrong when she entertained this application by Tan and when she went on to grant his prayer in quashing the decision of the EPF, when in fact and in law, she ought not to have done so. On that score alone, we allowed
F the Arab Malaysian and Amsecurities' appeal against that part of the decision of the learned High Court Judge.

[26] We were also in favour of allowing the appeal by the Arab Malaysian and Amsecurities on the ground that the dispute between the parties was predominantly in a nature of a private dispute. The private law elements in
G the dispute were clearly predominant *vis-à-vis* the public law elements. In this regard, we refer to the apex court decision in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 case where learned Justice James Foong FCJ said:

H A challenge on the use of appropriate procedure is very much fact-based. It is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law, then the court must ascertain which of the two is
I predominant. If the claim has substantial public law elements, then the

> procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. If the matter is under private law, though concerning a public authority it would be inappropriate to commence the action under O. 53 of the RHC. The courts should be cautious in allowing a matter that should be commenced by way of O. 53 of the RHC, to proceed in another manner.

[27] We were also with learned counsel for Arab Malaysian and Amsecurities on the issue of remuneration. Remuneration is part of the definition of wages. The word 'remuneration' itself is not defined in the EPF Act. It was clear that the learned High Court Judge had relied on the definition of the word given to it by the High Court decision in the case of *Chong Thian Fook v. Sarawak Shell Bhd & Ors (No 2)* [2004] 1 LNS 394; [2004] 7 MLJ 53 ("the *Chong Thian Fook* case") which decision had been over ruled by the Court of Appeal, which latter decision was subsequently affirmed by the Federal Court. The High Court in the *Chong Thien Fook* case *(supra)* had decided that since there was no specific definition provided for in the EPF Act, either of 1951 or 1991, then taking the view that the EPF Act was a piece of social legislation, a liberal definition ought to be given to the word 'remuneration'. In its plain and ordinary meaning, a liberal construction to that word must comprise the retirement benefits to the plaintiffs. The word remuneration was defined to be wider than the term 'salary'. *Prem's Judicial Dictionary* vol 2, p. 1415 was quoted by the learned High Court Judge for that proposition. The learned High Court Judge also cited, *inter alia*, the case of *The Queen v. Postmaster General* [1876] QBD 658 and the case of *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 PC.

[28] However, that did not settle the matter at hand. We had to go back to the agreement on the matter between Arab Malaysian and Amsecurities, and Tan. We noted too that such a term on the provision for the sharing of the profits from brokerage activities was inserted into his employment agreement with Arab Malaysian and Amsecurities on the insistence of Tan. Arab Malaysian and Amsecurities of course had agreed and the profit-sharing provision became part and parcel of the employment contract that would bind the parties. It would be opportune to refer to that provision which reads as follows:

> i. You will be entitled to an incentive, which shall be fifty percent (50%) of Net Brokerage (defined as per Appendix I attached) earned from business and dealings in securities from Merill Lynch's agency, programme and proprietary trade business and also its clearing account gain/loss. (Refer to Offer of Employment, Record of Appeal Part C (Appeal 1541), page 62)

[29] The keyword in that provision must necessarily be the word 'net' as opposed to 'gross' of the brokerage revenue. As such, in the context of the said contract of employment, Tan was entitled to 50% of the net profit. Net profit would presuppose that it represents a figure less costs and expenses, and in this case, such computation was captured in the term that had bound the litigating parties. Indeed, before it is a 'net' sum, it was a 'gross' sum. From the gross sum derived from the brokerage activities, certain heads of expenditures are deducted as costs and expenses. Indeed, this feature in the accounting was recognised in the profit-sharing provision in the brokerage fees between the parties. The issue had become whether Arab Malaysian and Amsecurities were entitled to deduct from the gross amount, as their EPF contributions as employers of Tan at the respective material times. Tan complained that such methodology was not permitted under the respective contracts of employment that he had with Arab Malaysian and Amsecurities. On the other hand, Arab Malaysian and Amsecurities had professed the exact contrarian view. Definitely as a profit sharing, it was not an entitlement. (See, *Employees Provident Fund Board v. MS Ally & Co Ltd* [1975] 1 LNS 36; [1975] 2 MLJ 89.)

[30] Having considered the submissions by all learned counsel, we were of the respectful view that Arab Malaysian and Amsecurities were correct in this regard. If one is to recall, the gravamen of Tan's complaint was encapsulated in the following term as contained in his letter of complaint to the EPF dated 8 September 2014, wherein he complained that "employer's portion of EPF was wrongly deducted from my gross income." Invariably that formula of computation as adopted by Tan's employer had reduced Tan's ultimate share in the net revenue emanating from the stockbroking activities. As such, Tan had lodged the complaint to EPF calling for it to review the mode of computation adopted by his employer, which Tan claimed had "wrongfully deducted from my incentive ..." Indeed, EPF had reverted back to Tan and expressed its view after due investigation undertaken by its staff. That view was contained in the EPF's letter to Tan dated 7 January 2015 as follows:

> 3.2 Pendapatan yang diterima akan dibahagi menurut kontrak dan sebelum pendapatan tersebut dibahagi antara pengkongsi, kos operasi hendaklah ditolak terlebih dahulu. Di dalam perkara ini kos operasi adalah termasuk bayaran caruman KWSP tuan. Ini telah dinyatakan secara jelas dalam kaedah pengiraan hasil pendapatan bersih incentive bonus ini di para (1) Appendix 1, Kontrak Perkhidmatan tuan di mana pendapatan berkenaan perlu menolak 'salaries and bonuses payable to any member of the execution team hired by the bank for John Tan'.

[31] As it had come to pass, Tan was aggrieved by EPF's view given in response to his complaint. But, granted that bonus may be included as remuneration, it was agreed by the parties in the contract of employment that the net profit was derivable after taking into account costs and expenses. The employer's EPF contribution would be a legitimate head of costs and expenses to be incurred by Arab Malaysian or Amsecurities, as the case may be, and they were susceptible to be deducted from the gross revenues. This is where the decision of the Court of Appeal, which was subsequently affirmed by the Federal Court, arising from the appeal by Sarawak Shell Bhd in *Sarawak Shell Bhd & Ors v. Chong Thian Fook & Another Appeal* [2007] 2 CLJ 624; [2007] 3 MLJ 697 had become so relevant. Legitimate deductions from the lump sum in order to arrive at the net amount due to a member under Shell Sarawak and Sabah Retirement Benefit Fund ("RBF") scheme included deductions due under reg. 7. We reproduce the relevant portion of the judgment of Abdul Aziz Mohamad JCA (as he then was) at p. 642 (CLJ); p. 699 (MLJ) therein, as follows:

> The term net amount simply meant that while the benefit due to a member from the RBF is sufficient lump sum specified in sub-cl. (2) of reg. 5, what is actually to be paid to him is the net amount after making the deductions authorised by reg 7, if any.

[32] We will next dwell on the issue of alleged illegality relating to s. 47 of the EPF Act and s. 25 of the Contracts Act 1950. This provision essentially prohibits an employer from deducting from the employee's wages. Suffice to say here that on account of the *ratio* in the Court of Appeal decision in the *Chong Thian Fook* case *(supra)* there was no merit in this contention by Tan. There was no contravention by the employer in the matter of them coming to the net amount for the sharing of profit with Tan. They were in fact, in compliance.

[33] There was another angle to the illegality issue, but this time from the employers' perspective ie, Arab Malaysian and Amsecurities. It has been this. If the learned High Court Judge found that the employer had contravened s. 47(1) of the EPF Act 1991, the effect would be that which was envisaged under s. 24 of the Contracts Act 1950. The judicial pronouncement on that section was reiterated by the Federal court in the case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212 and the *locus classicus* decision of Lord Mansfield in *Holman v. Johnson* [1775-1802] All ER Rep 98.

[34] We noted as well, that the essence of the complaint by Tan was that this was a case concerning s. 65 of the EPF Act, related to the recovery of contribution by the employer. If that be the case, the proper mode would be for EPF to be compelled to ensure that the employer pay its contribution to

EPF, not by way of requiring the employer to pay direct to Tan. We agreed with Arab Malaysian and Amsecurities' learned counsel that Tan should have filed for *mandamus* for that purpose, if indeed any contribution sum was due to be paid to EPF.

[35] Therefore, even on the merits, the decision of the learned High Court Judge was couched upon a wrong legal premise thereby rendering it susceptible to appellate intervention.

[36] As regards Tan's appeal, it was concerned with whether the learned trial judge was correct in her decision. EPF did not in the impugned EPF's letter express any views or finding on whether Arab Malaysian and Amsecurities were duty-bound to contribute 12% or 16% towards Tan's EPF. Indeed, that was not part of the complaints advanced by Tan. As a natural consequence thereof, we agreed with Arab Malaysian and Amsecurities that it would not be open to Tan to now challenge the same or to seek a consequential order for the payment of the differential sum. We noted as well that his statement pursuant to O. 53 of the ROC 2012 filed by Tan did not raise the issue of the differential. It is settled law that the party applying for relief is bound by the statement and cannot rely or go beyond the matters raised. The failure/omission to raise this issue in the statement would be fatal.

[37] From a scrutiny of the documents adduced in this case by all parties, it was an undisputed fact that it was Tan who had insisted that, as a term of the contract agreement between him and his two employers, the rate of EPF contributions to be made by the latter be 12%. The ensuing dispute between the parties was one that was substantially in the nature of a private dispute. As such, the learned High Court Judge was correct when she refused to grant Tan the consequential reliefs that he was praying for.

Conclusion

[38] Therefore, we were of the view that in the main, the facts of this case had revealed the true nature of the dispute. It was of a nature that was predominantly private as opposed to it being a dispute that was dominated by overwhelming public law elements. The case of *Ahmad Jefri (supra)* was instructive in that regard. The view expressed by EPF was merely advisory in nature. Even if the view of EPF was one that was given by a public authority, being a statutory body, the impugned decision is still one that is not amenable to JR as it was one that was made in the exercise of its investigation and prosecution powers, as explained in the preceding paragraphs, as illustrated by the apex court's decision in *Latheefa B Koya (supra)* decision following very much in the footsteps of *Sloan*'s case *(supra)*. Even on its merits too, the issues raised by Tan before the learned High Court Judge could not succeed as adumbrated by us, prior. (See the *Sarawak Shell Bhd Appeal* case *(supra)*). There was no illegality involved in this case and s. 47(1) of the EPF Act was not contravened by Tan's employers.

[39] Premised upon the above considerations, we were of the unanimous view that there was merit in the appeal lodged by Arab Malaysian and Amsecurities and we had allowed their respective appeal with costs. However, we were also unanimous in our view that the appeal lodged by Tan had lacked any merit, such that we had dismissed it with costs. All costs awarded were subject to payment of allocator fees. The decision of the learned judge was therefore varied to the extent as to reflect our orders accordingly. We ordered that the deposits be refunded to the respective appellants.

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